Supreme Court, U.S.
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No. 93-1365

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

THE SAMMETT CORPORATION,
Petitioner,

v.

KEY ENTERPRISES OF DELAWARE, INC.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITIONER'S REPLY

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INTRODUCTION

While conceding all of the essential facts, Respondent fails to come to grips with the anomalous and inappropriate result of the Eleventh Circuit's automatic and unreasoning imposition of vacatur in this case based upon the court's erroneous premise that this routine practice was commanded by this Court's decision in *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39-40 (1950), and related cases. Petitioner, indisputably a party throughout this action, prevailed in the district court, did not participate in the other parties' settlement arrangement aborting the appeal in which Petitioner vigorously was defending its position, and actively opposed vacatur. Nevertheless, the circuit court's action stripped Petitioner of the benefit of its judgment, imposed burdens upon it as to which Petitioner obtained no benefit because it had not

settled, and freeing Respondent from the necessity of prosecuting an appeal, allowed Respondent to sue Petitioner yet again on precisely the theory rejected as a matter of law in the district court's now-vacated opinion. This unfair and uneconomical result is hardly what this Court contemplated in *Munsingwear* and, given the arbitrary and inconsistent manner in which the courts of appeals, including the Eleventh Circuit, have been applying the doctrine of that case, this Court should grant this petition, resolve the legal conflict and reinstate the district court's judgment herein.

ARGUMENT

I. THE COURTS OF APPEALS HAVE APPLIED *MUNSINGWEAR* INCONSISTENTLY

Respondent is demonstrably incorrect in arguing that the proper application of *Munsingwear* is clearly understood. In granting certiorari in *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Phillips Corp.*, 113 S. Ct. 1249, *cert. dismissed as improvidently granted*, 114 S. Ct. 425 (1993), this Court recognized the wide split among the circuits as to the granting of vacatur when cases are settled on appeal. *See* Petition for Writ of Certiorari at pp. 14-19, and authorities cited therein. If Respondent's argument about clarity were correct, there simply would not be this panoply of inconsistent appellate determinations.

II. *MUNSINGWEAR* DOES NOT AUTOMATICALLY REQUIRE VACATUR WHEN A CASE SETTLES ON APPEAL

As we noted previously, neither *Munsingwear* nor *Duke Power Co. v. Greenwood County*, 299 U.S. 259 (1936), involved the occurrence of mootness as the result of settlement, and its application, therefore, cannot be assessed (as Respondent would have it) simply by reference to whether or not the parties have requested vacatur. The rationale for the precedent is broader, and it is inapplicable here.

Munsingwear and its progeny are premised on the rationale that a party whose appeal becomes moot through happenstance—arguably not because of self-initiated action—has lost its opportunity for judicial review, and so lower court determinations should not be given preclusive effect as to that party. Here, however, it was Respondent, not Petitioner, who had appealed, and it is Respondent who, gaining the windfall of release from having to appeal, is gratuitously stripping Petitioner of the benefit that it had won.[1]

Clearly, the *Munsingwear* doctrine should not apply to a situation where mootness is not happenstance but instead was created by a party who seeks adversely to affect the rights of another party who opposed the settlement. *See Karcher v. May*, 484 U.S. 72 (1987); *In re Memorial Hospital*, 862 F.2d 1299 (7th Cir. 1988). *See also Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313 (1971); *Montana v. United States*, 440 U.S. 147 (1979).

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[1] Suggesting that the district court's judgment was "totally discredited" (Brief in Opposition at 19), Respondent argues that Petitioner is attempting "to have its cake and eat it too" by arguing that that judgment must be reinstated. Respondent conveniently misses the point. Although a panel of the Eleventh Circuit indeed would have reversed the district court, a majority of the judges in active service on the court of appeals had enough difficulty with the panel decision to have ordered rehearing *en banc*. The panel's decision was then vacated and, because of the outcome initiated by Respondent but opposed by Petitioner, Respondent was relieved of having to justify before the circuit court as a whole the position of the panel and to demonstrate error in the judgment of the trial court.

Having won in the trial court, Petitioner could not have sought appellate review to gain an advisory opinion. Respondent demands the presumption of a successful appeal without having had to pursue an appeal at all. By initiating yet another suit against Petitioner on a discredited legal theory that has evaded judicial review, Respondent is not only eating its own cake, but that of others as well. It is thus eminently appropriate to restore the district court's judgment.

III. VACATUR HERE CONTRADICTS BOTH THE RATIONALE OF *MUNSINGWEAR* AND THE INTEREST OF JUSTICE

Munsingwear is premised upon a notion of fairness, i.e., that a party who is the victim of happenstance should not be prejudiced by it. However, the Court clearly understood that a party that truncates its appellate rights without settlement would be governed by res judicata and collateral estoppel emanating from the underlying judgment. *Munsingwear*, 340 U.S. at 39. Here, fairness must dictate that a party who did not enter into settlement—indeed, who opposed it—obtain the benefits of issue preclusion where its defeated opponent ends its appeal through a settlement from which it benefits. *See In re Memorial Hospital*, 862 F.2d at 1301.

IV. THIS COURT'S DISPOSITION OF THE *U.S. BANCORP MORTGAGE COMPANY* CASE WILL NOT RESOLVE THE INSTANT CASE

In *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 2 F.3d 899 (9th Cir. 1993), *cert. granted*, 114 S. Ct. 681 (Jan. 10, 1994) (No. 93-714), this Court has asked for briefs and oral argument on the issue of whether *Munsingwear* makes it appropriate for this Court to vacate a decision of a court of appeals where the parties have settled and a motion for vacatur has been filed by one of them. By its very nature, that case does not raise the issue of the effect of vacatur routinely imposed by a circuit court, where a party refused to settle and opposed vacatur and, having been stripped of the precedential value of the judgment it won with its opponent having avoided appellate review, has been sued again on the very theory it had once defeated. *U.S. Bancorp* thus will not dispose of the very real issue presented where vacatur is imposed upon a nonsettling party that had gained this Court's attention in *Izumi*, and which highlights the profound tension among the decisions of the courts of appeals. The case at bar, therefore, should be reviewed notwithstanding *U.S. Bancorp*.

CONCLUSION

For the reasons stated both herein and in its petition, Petitioner respectfully submits that the Court should grant the petition and should reverse the judgment of the Eleventh Circuit and order the reinstatement of the judgment of the district court.

Respectfully submitted,

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